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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1274

LEHIGH VALLEY RAILROAD COMPANY,

Petitioner,

v.

WM. SPENCER & SON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the HONORABLE THE CHIEF JUSTICE, and Associate Justices of the Supreme Court of the United States:

Petitioner, Lehigh Valley Railroad Company, respectfully prays that a Writ of Certiorari issue to review the final judgment* of the United States Court of Appeals for the Second Circuit entered on the 29th day of December, 1967, affirming the judgment of the United States District Court for the Southern District of New York, and the appeal docketed in the said Court of Appeals as No. 31016.

* The judgment entered in favor of plaintiff below has been satisfied.

Opinions of the Court Below

The opinion of the District Court is set forth at page 467a.* The opinion of the Court of Appeals for the Second Circuit is set forth at page 526a and is reported at 387 F. 2d 623.

Jurisdiction

The judgment of the Court of Appeals was entered on December 29, 1967. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254[1].

Questions Presented

1. Should a stevedore be held to have breached its express warranty to perform its services for a shipowner in a workmanlike manner by failing to make any inspection at all of the work area before permitting its employees to commence work?

2. Should the stevedore be permitted to delegate its duty to provide its employee with a reasonably safe place to work and avoid a breach of contract to perform its services in a workmanlike manner?

Statement of the Case

On March 21, 1961 plaintiff William McNeil was employed as a freight handler by William Spencer & Son Corporation. Spencer had an exclusive contract with Lehigh to load and unload all Lehigh barges at Jersey terminals and in New York except for certain private industries. Spencer had several supervisors on the pier and

* Numerical references followed by "a" are to the separate appendix herein. The opinions below are reprinted as an appendix to this petition.

spotted the various barges for loading and unloading, used their own equipment and had their own gang. Plaintiff McNeil testified that he was on the offshore side of the barge (99a), laying paper to protect bales of hops which were being carried on the barge by hi-lo machines (101a). There were six bales of hops loaded on the particular hi-lo machine that was working with McNeil's gang (104a). The hops originated from a railroad car on the pier (96a). As McNeil was standing approximately 10 feet from the stanchion which was in the bow doorway area, he being towed toward the stern, he observed said hi-lo come off the gangplank, make a turn around the stanchion (102a), proceed five feet toward him, when suddenly the front wheels sank and the load fell off. Two of the bales toppled forward (139a), came in contact with his left knee and the other four fell off the opposite way (104a). He found himself pinned up against the wall of the barge. A fellow-employee Rubin Smith caught him by an arm and led him to a bale to sit down (105a). When he sat down he went to the left side of the towmotor. When he was hit by the bales he was toward the front of the towmotor but about two and one-half feet from its right side (105a). He said that the left wheel of the towmotor went into a hole on the deck of the barge two and one-half to three inches deep and about 10 inches wide (106a). He said the hole was 16 to 18 inches long. Mr. McNeil testified that before this accident happened he did not see the hole (109a). He also testified that Tony Skiba came on the barge before the work commenced to show McNeil's gang what side of the barge they were supposed to work (128a). Prior to 8:30 A. M. when he first went on the barge he walked down the gangplank but did not observe the condition of the deck (131a). There was plenty of light on the barge but he did not look at the deck. The condition of the deck in the area where he first started laying papers was all right; there was no hole there. He had worked on many barges that had holes and had seen holes on decks of other barges before (132a).

The hi-lo operator on this day came down the gangplank from the bow-end door on the starboard side and headed for the offshore side (138a). Mr. McNeil was facing the bow-end of the boat. He was in the middle of the boat between the doorway areas (134a). The hi-lo proceeded from the doorway area five feet before the front wheels sank down (135a). Mr. McNeil testified that he had nothing to do with the direction of the hi-lo (139a) but on his deposition taken January 23, 1962 he stated that he did direct the hi-lo.

The next witness was Reuben Smith who testified he is presently a tavern owner but in 1961 was employed by Spencer (165a). He was also on the barge putting papers down, working with another gang on the inshore side. A little after 9:00 A. M. Preston Paige, the driver of the hi-lo, drove down to the boat and went to make a swing around to come in where he, Reuben Smith, was working and bales fell off the hi-lo (166a). He then observed that the left wheel was in a hole on the deck of the barge. The hole was around 18 inches long and eight or nine inches wide. Part of the plank was missing. He had not noticed this before the accident (167a). McNeil was standing about five feet away from the offshore side (168a). This witness testified that he was facing McNeil but had his back to the towmotor (169a). He then testified that he saw the towmotor make a left turn and that is when the bales fell off. He had shaped up that day at Pier C where the Spencer offices were (169a). His immediate superior was the checker who was Anthony Skiba. Skiba was in charge of the loading of the barge. He came on the boat once before the accident. Mr. Smith presumed that he looked around because he came on the boat (170a). He also was aware that there was a Spencer "cooper" on the pier and that the tide was "low", which meant that the gangplank was on a sharp angle (171a, 172a).

The next witness was Preston Paige who testified that he was the hi-lo driver and that he started to work on

March 21, 1961, at approximately 8:00 o'clock (175a). Just prior to the time Mr. McNeil got hurt he drove his hi-lo with six bales of hops onto the barge (176a). He came into the bow door and proceeded forward down the gangplank (low tide—sharp angle) (171a). He was operating the hi-lo so that you could count the lugs in the wheel which was just turning over. His ultimate destination was to take the bales to the stern (177a). Just as he was ready to make his turn the left wheel hit the hole and the whole load upset. After it happened he looked at the hole and saw that the plank was missing about a foot and one-half or two feet long, an inch and one-half or two inches deep. He was going to the offshore side and suddenly his wheel went into the hole of the barge (178a). The wheel stayed in the hole even after the accident but thereafter he pulled it out of the hole (179a); that the hole was the same depth the whole length and it was 6 or 8 inches in width (181a). He testified it was McNeil's job to put the paper down and to tell him, Paige, where to come on the barge (183a).

After the medical testimony Lehigh put in its case.

The first witness was Marine Inspector Charles Parrino who testified that he was called down to the barge about one-half hour after the accident occurred to examine the given area and saw no damage to the deck that would have made him take the barge out of service. He found the deck and deck sheeting in good condition (298a).

Lehigh next called Checker Anthony Skiba who on March 21, 1961 was the foreman over a gang on the barge which included William McNeil (372a). He informed General Foreman Frank Burns of the accident to McNeil. Prior to the accident as Skiba was going on duty he just happened to meet the barge captain (378a). He had a conversation with Mr. Walter with respect to odors and anything on the barge like empty pallets which had to be removed. He testified that the captain told him that the

barge was clean and odorless but he himself did not look at the floor of the barge (372a). Skiba conceded finally that he had told persons that the deck of the barge was in good condition. Then he said he was wrong about saying that in the courtroom. Skiba conceded that it was his job to go on the barge to see if there was anything damaged from a previous shipment (377a), but that he relied on the captain with respect to empty pallets and odors and so forth (378a). At one point he testified that he knew nothing about the condition of the floor of the barge, either before or after the accident.

The next witness was Peter Tolliver who had a job similar to McNeil's (334a). He testified that he observed the entire accident and that he saw the hole (335a). He denied giving a statement to Lehigh with respect to the fact that the cause of the accident was that Paige was driving the hi-lo machine too fast (337a), although he conceded that he made a change in the middle of the last page of the statement wherein he said this and initialed the change. He had acknowledged the fact in his own handwriting that he read the statement over and that it was true and that his friend Joseph Booker also signed the statement (344a).

Mr. Skiba was recalled by defendant and third-party plaintiff and a statement taken by his employer was produced wherein he had stated that he also had to check out the barge to see that it was clean and that there were no obstructions and that when he first checked the barge prior to the injury he had not noticed any holes in the barge floor (377a, 378a).

After the Lehigh Superintendent of Floating Equipment testified, the additional testimony from the deposition of plaintiff was read with respect to the fact that the blades of the hi-lo could tilt backwards but that the hi-lo driver did not have them tilted back; he had them level (405a).

The deposition of Spencer by its Foreman Frederick F. Burns, who was assigned to Pier I, Jersey City, New Jersey, was read to the jury. His duties were to supervise the handling of the job and to assign the job to the checkers and watch the whole pier. He did not go on the barges before the operation commenced. He went on Barge 79 after the accident. He testified that McNeil's job on the barge was guiding the towmotor and telling them where to place the draft. When he walked into the barge after the accident he did not examine it and no one told him how the accident happened but they said that bales had toppled off the towmotor. Mr. Burns was not responsible to his employer for the loading or unloading of the barge. The checker who was checking the freight would tell the gang how high on the barge to get the load. Before or after the accident to Mr. Burns' knowledge no one from William Spencer caused an inspection to be made of the barge and before he sent his men on the barge he did not cause an examination at all to be made of the barge.

When all sides rested the case was submitted to the jury. Defendant and third-party plaintiff requested the Court to charge the jury that plaintiff and his co-employees, and more particularly the Supervisor, were under a duty to observe the place of the accident and to use reasonable care in view of those conditions to prevent injuries. The request was denied (428a).

The case was submitted to the jury by a special verdict (470a). The jury found that circumstances warranted a finding of negligence against the Lehigh Valley Railroad Company and unseaworthiness of Lehigh Valley Railroad Barge No. 79. The jury found there was no negligence on the part of any employee of Wm. Spencer & Son Corporation. Judgment was accordingly entered in favor of respondent (Third Party Defendant below).

Petitioner appealed to the Court of Appeals for the Second Circuit. On December 29, 1967 the Court of Appeals

rendered its decision affirming the judgment of the District Court. The Court of Appeals expressed the view that the stevedore had no duty to inspect the barge before work was begun under the holding of *Orlando* v. *Prudential Steamship Corp.*, 313 F. 2d 822 (2d Cir. 1963). That Court also stated that it was not error for the trial court to refuse to charge the jury with respect to the duty that the stevedore owed its employee since the breach of such duty did not give rise to a right of indemnity of a shipowner sued by the employee, citing *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952).

This Court's opinion in the *Halcyon* case dealt clearly with contribution between joint tort feasors only and has nothing to do with petitioner's indemnity claim which was strictly a matter of a contract between itself and the respondent (15a, 16a, 17a, 18a, 19a, 20a, 21a, 22a, 23a and 24a).

Reasons for Granting the Petition for Certiorari

The instant petition seeks a statement by this Court upon an issue which has arisen time and time again. The issue is simply whether or not a stevedore who has to all intents and purposes an exclusive contract with a shipowner to load and unload vessels has a duty to inspect the vessel before it directs its employees to perform work.

The panel of the United States Court of Appeals for the Second Circuit which decided the instant case made the flat statement that "Spencer had no duty to inspect the barge before work was begun." This statement completely ignores the fact that the stevedore's immediate supervisor (gang foremen) testified that it was his job to look over the vessel to see that it was clean, free of dirt and odorless (330a, 331a, 332a and 333a). Instead of performing this task the supervisor or checker relied upon the barge captain who told him it was safe to start working the boat.

The Court of Appeals in the instant case ignored its holding in *Hutton Company* v. *Arrow Builders Supply Corp.*, 371 F. 2d 944 (2d Cir. 1967), which clearly stated that a barge captain was no more than a laborer or deckhand and not to be looked upon as a shipmaster, certainly not a person qualified to judge the condition of a floor of a barge before loading.

Argument

Petitioner believes the record is clear that Spencer, which was by contract Lehigh's exclusive stevedore on New Jersey piers, made no inspection, cursory or otherwise, of any part or parts, of Barge 79 on March 21, 1961 before or after the accident. Spencer's checker or gang foreman, Anthony Skiba, testified that before he went on, he ran into the barge captain or bargee, Andrey Walter, and inquired of the bargee, "Captain, is there anything on the barge? Is it empty, empty pallets or something that has to be removed?" The reply received from the bargee was "No. It's perfectly clear, it's all set." And that it was safe to start working on the boat (372a, 378a).

Spencer, as aforementioned, was Lehigh's exclusive stevedore on the New Jersey piers and was hired as an expert stevedore, Lehigh being an operating railroad and not in the stevedoring business.

In *Hutton Company* v. *Arrow Builders Supply Corporation*, 371 Fed. 2d 944 (2nd Cir. 1967), the Court of Appeals for the Second Circuit clearly defined and established the position of a barge captain as no more than a laborer or deckhand, stating at page 948 of the report:

> "There are a considerable number of cases dealing with the barge owner's responsibility for the conduct of his bargee. The leading case of Dailey v. Carroll, 248 F. 466 (2 Cir. 1917), establishes that these employees who owe their employers the duty to care

> for their vessels are no more than laborers or deckhands and are not to be looked upon as shipmasters. Generally, the courts have held that a bargee is responsible to his employer for actions in which he participated if the result was attributable to the exercise of his judgment in a matter which he is to be deemed capable of judging. See, for example, The Teno, 47 F. 2d 197 (2 Cir. 1931); Hastorf Contracting Co. v. Ocean Transp. Corp., 4 F. 2d 583 (SDNY 1923), aff'd 4 F. 2d 584 (2 Cir. 1924)."

The stevedore Spencer, in performing its contract with Lehigh, relied on a person who was not qualified to exercise a judgment in a business which he could in no way be deemed capable of judging.

In one of the landmark cases, *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 (1956), the Supreme Court of the United States, stated at pages 133, 134:

> "This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."

Spencer, bearing in mind that a portion of the plank was missing, as the jury so found, had no right to rely on the judgment of a "deck hand" or "laborer" before directing its employees to proceed to a barge without even so much as a glance at the work area (378a). While the barge with a missing portion of a plank was found to be unseaworthy, the substandard professional performance of Spencer as aforesaid, was clearly a proximate cause of the accident.

Spencer, as plaintiff's employer, was under a duty to exercise reasonable care to provide him with a reasonably safe place within which to work. Correlatively Lehigh, since plaintiff was its invitee, was under a similar duty. Thus there was a concurrent duty on the part of each to exercise reasonable care to provide plaintiff with a reasonably safe place in which to work and "neither could devolve its duty to him upon the other, however much they might agree upon its final incidence as between themselves * * *." (*Williams* v. *Lehigh Valley Railroad Co.*, 151 F. Supp. 809.)

Porello v. *United States*, 2 Cir. 153 F. 2d 605, 608, modified on other grounds 330 U. S. 446;
Anderson v. *Lorentzen*, 2 Cir. 160 F. 2d 173;
Miller v. *The Sultana*, 2 Cir. 176 F. 2d 203;
McFall v. *Compagnie Maritime Belge*, 394 N. Y. 314, 324, 107 N. E. 2d 463;
Vanderlinden v. *Lorentzen*, 2 Cir. 139 F. 2d 995, 997;
Muratore v. *United States*, D.C.S.D.N.Y. 100 F. Supp. 276.

In *Williams* v. *Lehigh Valley Railroad Co.*, *supra*, the Court found that Lehigh did not furnish additional lights although portable lights were readily available and found the Railroad negligent for its omission to furnish additional lights which was a proximate cause of the accident. The Court, however, stated at page 813 of the opinion the following:

> "In the hours after darkness fell Spencer could readily have observed and corrected the inadequate illumination condition; its failure to do so was not the exercise of reasonable care and constituted negligence. In this connection it is noted that under the contract Spencer was obligated to provide '* * * sufficient and competent labor, checking and supervising forces'. Adequate light would have made the broken dunnage observable either when first picked up from the pile

or, as the work progressed, after it had been placed in position to receive the drafts of steel beams, and thus enabled Williams to avoid its use. The negligent conduct can reasonably be said to have been the proximate cause of Williams' injuries."

Brabazon v. *Belships Co.*, 3 Cir. 202 F. 2d 904;
Petterson v. *Alaska S.S. Co.*, 9 Cir, 205 F. 2d 478, affirmed 347 U. S. 396;
Tarkington v. *U. S. Lines Co.*, 2 Cir. 222 F. 2d 358;
Ryan Stevedoring Co., Inc. v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124.

With respect to Spencer's duty to perform in a workmanlike manner under its exclusive stevedoring contract with Lehigh, the Court correctly charged the jury, the duty Lehigh owed to the plaintiff, and merely alluded to the fact that there was a duty that Spencer owed to the plaintiff without spelling out what the duty was in accordance with the specific exception and request of Lehigh (458a, 459a).

CONCLUSION

The judgment in favor of respondent (third-party defendant below) should be reversed and the lower Court directed to enter judgment in favor of petitioner.

Respectfully submitted,

THOMAS V. MCMAHON,
20 Exchange Place,
New York, N. Y. 10005.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 124—September Term, 1967.

(Argued October 19, 1967 Decided December 29, 1967.)

Docket No. 31016

WILLIAM MCNEIL,

Plaintiff-Appellee,

v.

LEHIGH VALLEY RAILROAD CO.,

Defendant-Appellant and
Third-Party Plaintiff-Appellant,

v.

WM. SPENCER & SON CORPORATION,

Third-Party Defendant-Appellee.

Before: WATERMAN, MOORE and HAYS, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* entered upon a jury verdict against appellant in the amount of $75,000 and from orders of the same court denying appellant's motion to set aside the verdict and petition for limitation of liability.

Affirmed.

ALFRED S. JULIEN, New York, New York (Abraham J. Hirschsprung, New York, New York, of counsel; Julien, Glaser, Levitt & Blitz, New York, New York, on the brief), for Appellee, William McNeil.

THOMAS V. MCMAHON, New York, New York (Conboy, Hewitt, O'Brien & Boardman, New York, New York, on the brief), for Appellant.

JOHN NIELSEN, New York, New York (Fogarty and Nielsen, New York, New York, on the brief), for Appellee, Wm. Spencer & Son Corporation.

PER CURIAM:

Plaintiff, a stevedore, was injured while working on a barge owned by the Lehigh Valley Railroad. He brought suit against the railroad which in turn asserted a claim for indemnity against Wm. Spencer & Son Corporation, plaintiff's employer. The jury returned a special verdict, finding that the railroad was negligent, that its barge was unseaworthy, that plaintiff was not guilty of contributory negligence, that the negligence of Wm. Spencer & Son Corporation did not contribute to the accident, and that plaintiff had suffered damages of $75,000. Judgment was entered awarding plaintiff this amount and dismissing the third-party complaint.

The railroad's motion to set aside the verdict as excessive and against the weight of evidence was denied. After a hearing, the railroad's petition to limit its liability under 46 U. S. C. § 183 to the value of the barge and the freight then pending was also denied. From the judgment and

from the foregoing rulings the Lehigh Valley Railroad appeals. We affirm.

There was evidence from which the jury could have concluded that there had been a large "chip" in the barge planking for at least two months prior to the accident, that one wheel of the hi-lo truck used in loading the barge slipped into the "chip" causing some of the bales it was carrying to fall off, and that two such bales struck plaintiff in the leg, injuring him severely.

The denial of a motion to set aside a verdict as against the weight of evidence is not appealable. *Mahoney* v. *New York Central Railroad,* 234 F. 2d 923 (2d Cir. 1956).

The verdict for plaintiff was large, but it was not so excessive that it would be a denial of justice to permit it to stand. See *Dagnello* v. *Long Island Rail Road Co.,* 289 F. 2d 797, 806 (2d Cir. 1961). The testimony showed that plaintiff was out of work for over a year, that he will continue to have pain and swelling in the injured leg, and that a traumatic arthritis resulting from the injury will probably become progressively worse.

Spencer had no duty to inspect the barge before work was begun. *Orlando* v. *Prudential Steamship Corp.,* 313 F. 2d 822 (2d Cir. 1963). The trial court's refusal to charge the jury with respect to the duty which Spencer owed plaintiff did not constitute error since a stevedore's breach of duty to its employee does not give rise to a right of indemnity in favor of a shipowner sued by that employee. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U. S. 282 (1952).

The district court properly denied appellant's petition for limitation of liability. Under 46 U.S.C. § 183(a) limitation is available only where the liability is incurred "without the privity or knowledge" of the owner. The evidence showed that appellant's General Marine Inspector inspected the barge at least once every three weeks. Ade-

quate inspection would have disclosed the hole in the planking. Negligent failure to discover constitutes privity and knowledge within the meaning of the statute. See *The Republic,* 61 F. 109 (2d Cir. 1894); *Avera* v. *Florida Towing Corp.,* 322 F. 2d 155, 166 (5th Cir. 1963). See also *Great Atlantic & Pacific Tea Co.* v. *Brasileiro,* 159 F. 2d 661 (2d Cir.), cert. denied, 331 U. S. 836 (1947).

Affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result.

(949)

Memorandum Opinion by Bonsal, D. J., Denying Defendant's Motion to Set Aside Verdict.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Memorandum.

BONSAL, D. J.:

This action was tried before the court and a jury on October 26-31, 1966. On November 1, the jury returned a verdict of $75,000 in favor of the plaintiff, and a verdict in favor the the third-party defendant against the third-party plaintiff in the action for indemnity. Following the verdict, the defendant and third-party plaintiff moved orally to set aside the verdict in favor of the third-party defendant or for the direction of a verdict in favor of the third-party plaintiff in the third-party action, or in the alternative, for a new trial.

(950) On the evidence adduced at trial, the liability of the third-party defendant depended on proof that the plaintiff or some other employee of the third-party defendant was negligent and that such negligence contributed to the plaintiff's accident.

The evidence adduced at the trial was sufficient to support the jury's verdict that there was no such negligence on the part of the plaintiff or any other employee of the third-party defendant. See *Cia Maritima del Nervion* v. *James J. Flanagan Shipping Corp.*, 308 F. 2d 120 (5th Cir. 1962); *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32 (3d Cir. 1961), *cert. denied*, 369 U. S. 848 (1962).

Memorandum Opinion by Bonsal, D. J., Denying Defendant's Motion to Set Aside Verdict.

The jury found that the defendant's barge was unseaworthy and that the defendant was negligent. The unseaworthiness was due to a hole in the deck of the barge. The third-party defendant was not under an absolute duty to discover the hole, which would not have been obvious upon a cursory inspection. See *Orlando* v. *Prudential Steamship Corp.*, 313 F. 2d 822 (2d Cir. 1963); *Ignatyuk* v. *Tramp Chartering Corp.*, 250 F. 2d 198 (2d Cir. 1957).

In view of the jury verdict, which was supported by the evidence, the third-party plaintiff has failed to establish breach of the stevedoring contract or breach of third-party (951) defendant's implied warranty thereunder.

Accordingly, defendant's motions are denied.

It is so ordered.

Dated: New York, N. Y., November 21, 1966.

DUDLEY B. BONSAL,
U.S.D.J.

Proof of Service

I, THOMAS V. MCMAHON, counsel for petitioner LEHIGH VALLEY RAILROAD COMPANY and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of March, 1968 I served copies of the foregoing Petition for Writ of Certiorari on the respondent Wm. Spencer & Son Corporation by mailing copies in a duly addressed envelope with first class postage prepaid to respondent's attorneys of record, Fogarty and Nielsen, Esqs., 10 Rockefeller Plaza, New York, New York 10020.

THOMAS V. MCMAHON,
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OCTOBER TERM, 1967

No. 1274

LEHIGH VALLEY RAILROAD CO.,
Petitioner,

WM. SPENCER & SON CORPORATION,
Respondent.

On petition for a writ of certiorari to the
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WM. SPENCER & SON CORPORATION IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1274

LEHIGH VALLEY RAILROAD CO.,
Petitioner,

WM. SPENCER & SON CORPORATION,
Respondent.

On petition for a writ of certiorari to the
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WM. SPENCER & SON CORPORATION IN OPPOSITION

Opinions Below

The opinion of the District Court is set forth at page 467a, Petitioner's separate appendix.

The opinion of the Court of Appeals for the Second Circuit is set forth at pages 13, Petitioner's Petition and is reported at 387 Fed. 2d 623.

Jurisdiction

The judgment of the Court of Appeals was entered on December 29, 1967. The jurisdiction of this Court is invoked under Section 1254(1) of 28 U. S. Code.

Questions Presented

1.) Does a stevedore found free from negligence by the jury, owe a shipowner, who is obligated to furnish a seaworthy vessel, an affirmative obligation of inspecting the vessel for defects before sending its men aboard?

2.) Can a shipowner, obligated to furnish a seaworthy vessel, assure the stevedore the vessel is safe and then seek indemnity from the stevedore who relied upon such assurance?

Statement

After jury trial, verdict in the sum of $75,000 was rendered in favor of plaintiff against defendant, Lehigh Valley Railroad Co. (Lehigh), and in favor of the third-party defendant, Wm. Spencer & Son Corporation (Spencer) dismissing the third-party complaint.

In answer to special questions submitted to it, the jury found (1) that Lehigh's vessel was unseaworthy; (2) that Lehigh was negligent; (3) that said unseaworthinesss or negligence was a proximate cause of plaintiff's accident; (5) that plaintiff was not guilty of negligence contributing to the accident; and (8) that no negligence of any employee of Spencer contributed to the accident (470a-471a).

The Court of Appeals for the Second Circuit unanimously affirmed the judgment.

Facts

On March 21, 1961, plaintiff, a longshoreman or chenango in the employ of Spencer, was injured while working on Barge No. 79, owned by Lehigh and berthed at Jersey City (31a, 95a, 96a). The gang in which plaintiff worked consisted of 7 men, plaintiff, whose job it was to put paper on the floor of the barge, being the only

one who was working aboard the barge. The other members of the gang were 2 hi-lo operators and 4 men who worked ashore. Plaintiff had gone aboard No. 79 about a half-hour before the accident occurred and was working toward the stern on the offshore side of the vessel (96a, 97a, 98a, 99a, 101a, 108a, 132a).

There were 4 doors on this covered barge, one toward the stern on each side and one toward the bow on each side. Running across the barge between the bow doors was a runway of planks raised about 2 inches above the deck boards which ran from bow to stern (66a, 99a, 102a, 134a, 137a).

Plaintiff had started working near the stern and had moved forward, laying paper but had not yet reached the runway. A hi-lo, operated by Paige, one of the hi-lo operators in plaintiff's gang, drove from the pier onto the barge with bales of hops, drove across the runway at the bow doors and was about to turn left to go toward the stern to where plaintiff had laid the paper when the left front wheel of the hi-lo went into a hole formed by a piece of missing plank from the runway and the load fell off, part of it striking and injuring plaintiff. The hole was described as 16 to 18 inches long, about 8 to 10 inches wide (a plank being that wide) and 2½ to 3 inches deep (100a, 102a, 104a, 106a, 134a, 135a, 137a, 139a, 166a, 167a, 171a, 175a, 176a, 177a, 178a, 179a, 180a, 181a, 336a).

No employee of Spencer, including plaintiff and his superior, Anthony Skiba, the freight checker, had any knowledge of the condition which caused the accident (109a, 131a, 132a, 170a, 336a, 343a).

Audrey Walter, Lehigh's barge captain aboard No. 79, was in charge of said vessel which was at least 45 years old. His duties were to check cargo in and out, to see that the barge was in good condition, having no leaks or serious damage, and to make weekly inspections and reports and to report any condition he felt needed repairs

(32a, 46a, 65a, 314a). He described the condition he saw after the accident where the hi-lo lost its load as a chip of board 8 to 12 to 18 inches long, 3 inches wide and about ½ inch thick and had existed 2 or 3 months. He claimed he did not consider this such a condition as warranted repair and made no mention of it in any of his reports (32a, 33a, 41a, 42a, 46a, 47a, 57a, 67a, 76a, 77a), although he was supposed to report such a condition as described by plaintiff's witnesses (65a).

Charles Parrino, LEHIGH'S Marine Inspector, allegedly made periodic inspections and went aboard No. 79 some time after the accident and looked at the area the barge captain pointed out as the site of the accident and the deck sheeting was in good condition but he had no way of knowing if this was where the accident occurred. He agreed that had such a defect as testified to by plaintiff's witnesses existed, it would have been his duty to order it repaired (298a, 311a, 313a). The jury could find from his testimony a haphazard system of inspection, no records being made of any inspections, when and if made.

Anthony Skiba had not been aboard No. 79 prior to the accident. Since the barge was to be loaded with hops, it must be odorless and the floor clean. That is all he'd be interested in, it not being his duty to inspect the barge deck for defects. He went to the pier to check to make sure they had the right barge. He testified, and his testimony was not refuted by Lehigh's barge captain, that he did not check aboard No. 79 to ascertain whether it was odorless and the floor clean because when he reached the pier where No. 79 was berthed, he met Captain Walter coming to the open door of No. 79 and asked: "Captain, is there anything on the barge? Is it empty, empty pallets, or something that has to be removed?" to which Walter replied: "Nothing on there". Skiba asked: "Does the barge have any odor or something?" and Walter replied: "No. It's perfect, clear. All set"; "It's in perfect shape"

(323a, 328a, 329a, 330a, 331a, 374a, 377a, 378a, 379a). So, he didn't check because the captain assured him the barge was O. K. (331a, 378a, 379a).

> "Well, to tell you the truth it wasn't necessary to look at the flooring or anything. The captain said it was clean and odorless and it was safe to start working the boat." (323a)

As noted, no attempt was made by Lehigh to refute said testimony nor is any claim made by Lehigh that the conversation testified to by Skiba did not take place.

POINT I

There was no breach by Spencer of its contract.

Lehigh argues that Skiba, Spencer's checker, had no right to rely upon the representations of its barge captain, Walter, in assuring Skiba that the barge was odorless, clean and safe to work on, predicating its argument on the premise that Walter, whom it had put in charge of its barge and who was under a duty to inspect the barge for defects in its deck was a "deck hand" or "laborer."

Said argument is based upon two untenable premises since (1) the duty to inspect and report conditions of the barge deck were within the duties given to Walter by Lehigh and involved nothing intricate and (2) there was no duty on Spencer to inspect the barge prior to letting its men aboard.

(1)

Lehigh relies upon *Hutton Co.* v. *Arrow Bldrs. Supply Corp.*, 371 Fed. 2d 944 (C. A. 2), arguing that Walter was a laborer or deckhand. But the Court did not hold, as Lehigh would infer, that in no case can an employer be

liable for his judgment. The Court specifically noted (p. 948):

> "* * * Generally the courts have held a bargee is responsible to his employer for actions in which he participated *if the result was attributable to the exercise of his judgment in a matter which he is deemed capable of judging.*" (italics added)

Lehigh, which made as part of Walter's duties the inspection of the barge and the reporting of such conditions as he deemed necessary of repair, deemed him capable of judging in this matter. Nor was this a condition demanding such knowledge as such a person, a barge captain with years of experience, would be incapable of.

Nowhere in the *Hutton Co.* decision did the Court hold that the matter there, determining whether it was safe to change the barge's position at the dock by using the current and judging whether it was running up or downstream, was not such a matter which the barge captain was capable of judging since this determination was not necessary for the Court's decision in favor of the barge owner; rather, the holding was based on absence of reliance by respondent's employees upon anything the barge captain did or said:

> "* * * But here it is Arrow's claim that the inactivity of the quiescent bargee while Arrow's employees negligently damaged the barge makes the barge owner liable for damages to his own barge. As the district court points out, the bargee merely interposed no objection to the action taken by Arrow's employees and took no active part in the operation that Arrow was performing for Arrow's sole convenience.
>
> Here there is nothing in the record to show that Arrow's employees relied in any way on the bargee's judgment or his beliefs about which direction the tide was running. The participants were all employees of

> Arrow who wished to unload cargo belonging to Arrow and relied upon their own judgment and beliefs as to how best to accomplish the end desired."

In *Hastorf Contracting Co.* v. *Ocean Transp. Corp.*, 4 F. 2d 583, aff'd 4 F. 2d 584 (C. A. 2), cited in the *Hutton Co.*, case, *supra*, Judge Learned Hand stated (1), page 584:

> "No doubt the line will always remain hazy; it is impossible to say just what the bargee must know. Such simple things as handling the lines, warping the barge to a safe berth, avoiding known dangers (*Morey* v. *New Rochelle*, 254 F. 425, * * * (C.C.A. 2)), pumping, covering the hatches, stopping the load at the barge's capacity, and other matters fairly within the competence of the ignorant men who man such craft—all these and no doubt many more may be charged to them."

Lehigh, having itself assigned this duty to Walter, cannot argue that he is incapable of determining visually the condition of the vessel and whether it is safe for longshoremen to load.

(2)

But there was no duty on Spencer to perform Lehigh's duties, i.e., to inspect its barge for repairs, before sending its men aboard No. 79, as pointed out by Judge Bonsal, in denying Lehigh's motion to set aside the verdict (467a-468).

In *Orlando* v. *Prudential S. S. Corp.*, 313 F. 2d 822 (CA2—1963), the Court held there was no such duty, pages 823-4:

> "In the present case the appellant contends that American should be held to have broken its implied warranty of workmanlike service on either of two

theories. The more far reaching, and the one to be first discussed, is the claim that a stevedore is required to inspect a vessel before sending its men aboard to commence work.

"* * * Judge Palmieri found that the unseaworthy condition which caused Orlando's injury had existed for an hour and twenty minutes before any employee of the stevedoring company boarded the vessel; moreover, he found that during that period the company had access to the ship and could have discovered the unseaworthy condition if it had inspected the working area. However, after a scholarly review of the authorities, the Judge concluded that no case had imposed the duty of inspection before beginning operations. We agree with this conclusion."

"* * * And in *Drago* v. *A/S Inger* (E.D.N.Y.) 194 F. Supp. 398, 404-405, aff'd 2 Cir., 305 F. 2d 139, the court did not imply a duty of prior inspection, but held that a stevedore chargeable with constructive notice of a dangerous condition through the knowledge of its employees has a duty to remedy the condition, or to have it remedied. Nor does our reading of *Crumady* v. *The Joachim Hendrik Fisser,* supra, and *Calmar S. S. Corp.* v. *Nacirema Operating Co.,* 4 Cir., 266 F. 2d 79, cert. denied 361 U. S. 816, 80 S. Ct. 56, 4 L. Ed. 2d 62, elicit from those cases any duty of inspection prior to the stevedore's sending aboard a gang of longshoremen. Since no decision has recognized such a duty, and since there was no evidence as to the existence of a custom or practice to that effect, we see no reason to impose such a duty in this case. Cf. The T. J. Hooper, 2 Cir., 60 F. 2d 737, cert. denied 287 U. S. 662, 53 S. Ct. 220, 77 L. Ed. 571."

Same:

Waterman S. S. Co. v. *David* (5 Cir.) 353 F. 2d 660, 666;

Ignatyuk v. *Transp. Chartering Corp.* (2 Cir.) 250 F. 2d 198.

The jury has found, upon the evidence, that no negligence of any employee of Spencer contributed to plaintiff's accident.

Lehigh argues that, contrary to the jury's finding, a substandard performance by Spencer of its stevedoring contract was the proximate cause of the accident, citing *Ryan Steved. Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133, 134. But in *Ryan*, the accident was caused by the manner in which the stevedore stowed the cargo and the stevedore sought to escape liability because the shipowner failed to supervise its work. The reverse is true in the instant case, i.e., the shipowner, which had a duty to furnish a seaworthy vessel and represented to the stevedore the vessel was safe, seeks to avoid liability for its breach of duty by transferring its duty to Spencer, the stevedore. Just as in the *Ryan* case the stevedore could not escape liability by using the shipowner's duty to discover and correct the stevedore's own breach of duty, so here, where Spencer owed no duty to inspect the condition of the vessel, the vessel owner Lehigh cannot use Spencer's failure to discover the defect as an escape from its own contract.

In *Weyerhauser S. S. Co.* v. *Nacirema Oper. Corp.*, 355 U. S. 563, 567, this Court stated that the ship is entitled to indemnity where the stevedore renders substandard performance which led to foreseeable liability of petitioner "*absent conduct on its part* sufficient to preclude recovery".

Note also the decision in *McNamara* v. *Weichel etc.*, 293 F. 2d 900: "This obligation to indemnify may be nullified, however, if Weichel's conduct was such as to preclude recovery."

In *Hudson S. S. Co.* v. *Colon* (1st Cir.) 314 F. 2d 44, the vessel was denied indemnity where it allegedly fixed the

winch after complaints and told the stevedore it was fixed. "Appellant cannot complain that appellee relied upon its instructions" (p. 45). And in *Moore-McCormack Lines* v. *Maryland Ship Ceiling Co.* (4 Cir.) 331 F. 2d 663, wherein ships carpenters were made ill when they went into a hold containing tobacco which had been fumigated after being advised by the ship's relief officer the smell was that of tobacco and there was nothing harmful when he had not made any inquiry. The third-party complaint was dismissed, the jury finding that the ship had assured the stevedore it was safe to send men into the hold, that the stevedore's foreman acted reasonably in sending men into the hold and that the stevedore should not have discovered the gas.

In *Hodgson* v. *Lloyd Brasiliero Patrimonio Nacional* (3 Cir.), 294 F. 2d 32, the vessel sought indemnity from the stevedore on the theory that once the stevedore became aware of the defects in the winch, it was under a duty to cease using it until repaired. But there was testimony that a member of the crew, notified of the defect, worked on it for a while and then told the winchman it was O. K.—to go ahead and the accident occurred on the first or second load thereafter. The Court said, page 34:

> "It was for the jury to determine whether it was unworkmanlike for the stevedoring company to continue operating the winch which it knew had been defective, after receiving a categorical assurance from the shipowner's crew that it was "O. K." The same can be said for the shipowner's argument that the stevedoring company, even before the accident, knew that the winch was defective and that efforts at repair had been unsuccessful. At most, it can be said that these are questions over which reasonable men could differ, and that, as such, they were properly referred to the jury.

"The shipowner refers us to *Calderola* v. *Cunard S.S. Co.*, 2 Cir., 279 F. 2d 475, *Smith* v. *Jugoslavenska Linyska Plovidea*, 4 Cir., 1960, 278 F. 2d 176, *Weigel* v. *The M/V Belgrano*, D. C., D. Or. 1960, 188 F. Supp. 605, and *Hugev* v. *Dampskisaktieselskabet International*, D.C.S. D. Cal. 1959, 170 F. Supp. 601, affirmed, 9 Cir. 274 F. 2d 875, certiorari denied, 1960, 363 U. S. 803, 80 S. Ct. 1237, 4 L. Ed. 2d 1149, which can be readily distinguished, for in none of those cases did the shipowner, as was true here, assure the stevedoring company that the known defects had been repaired."

In *Pacific Far East Line* v. *California Stevedoring & Ballast Co.* (D. Calif.), 238 F. Supp. 956, 959:

"It has been properly recognized, however, that indemnity should be denied whenever the shipowner participates in some way in the decision to work on unsafe, unseaworthy area, for example, by misleading the stevedore company into believing that the condition has been repaired, *Torres Cruz* v. *Hudson Steamship Co.*, 206 F. Supp. 216 (D. Puerto Rico, 1962), affirmed 314 F. 2d 44 (1st Cir., 1963), or that it is actually safe, *Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2d 663 (4th Cir. 1962), or by otherwise inducing the stevedore to go on with the work. *United States* v. *Harrison*, 245 F. 2d 911 (9th Cir. 1957).

"Of course, when the stevedore company is not aware of the unseaworthy condition and cannot reasonably be expected to discover it, the rule becomes inapplicable and, absent unworkmanlike performance in some other respect, the stevedore company cannot be held. *Cia Martina Del Nervion* v. *James J. Flanagan Shipping Corp.*, 308 F. 2d 120 (5th Cir. 1962); *Ray* v. *Compania Naviera Continental*, 203 F. Supp. 206 (D. Md. 1962);

Thompson v. *Trent Maritime Co.*, 222 F. Supp. 221 (E. D. Pa. 1963); *Wujek* v. *Compania Sud Americana De Vapores*, 224 F. Supp. 853 (D. Md. 1964). Cf. *Niccoli* v. *Den Norske Afrika-Og Australielinie, etc.*, supra, footnote [332 F. 2d 651 (2 Cir. 1964)]."

The jury having found that no negligence of Spencer contributed to plaintiff's accident, Lehigh was not in any event entitled to indemnity from Spencer for Lehigh's breach of its duty.

(3)

Spencer's duty to Lehigh was clearly charged by Judge BONSAL and Spencer's liability to Lehigh if any, did not turn on their duty to plaintiff.

The Trial Court specifically and clearly charged (453a-454a):

"Now, the stevedoring company is under a contract with the railroad to load its Barge 79, and the stevedoring company was under a duty to perform that task in a reasonably careful and efficient manner and, of course, there was no duty of the Lehigh Valley Railroad to supervise the work being done by the employees of the stevedoring company.

Now, if you find that the negligence of any of the employees of the stevedoring company—and this would include the plaintiff himself—any of the employees of the stevedoring company contributed to the causing of this accident and to Mr. McNeil's injury, then the stevedoring company failed in its obligation to the railroad to perform its duties in a reasonably careful and proper manner.

And therefore, under those circumstances, the Lehigh Valley Railroad is entitled to reimbursement 697) from the stevedoring company for whatever amount the plaintiff recovers.

> So if you should find that there was a hole on this barge deck, and if you should find that the stevedoring company either knew about the hole on the deck or should have known about it, in the exercise of reasonable or ordinary care, then the stevedoring company should have, of course, exercised reasonable prudence to warn its employees about the hole and to tell the railroad about it and to take such steps as would be reasonable to prevent the hole causing any accident."

In *Ryan Steved. Co.* v. *Pan-Atlantic S. S. Co.*, 350 U. S. 124, this Court said, page 132:

> "* * * On the other hand, the shipowner's action for indemnity here is not based merely on the ground that the shipowner and contractor each is responsible in some related degree for the tortious stowage of cargo that caused injury to Palazzolo."

And at page 134:

> "* * * Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of cargo, it is clear, that as between themselves, the contractor, as the warrantor of its own services cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense."

Thus, whatever duty Spencer may have owed to its employee, the issue between Lehigh and Spencer was explicitly charged.

The cases cited by Lehigh at pages 11 and 12 of its petition do not support its position that the Trial Court erred in not charging, as to the third-party action, what duty Spencer owed to plaintiff, its employee.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Wm. Spencer & Son Corporation.

JOHN NIELSEN,
Of Counsel.